

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

TRACEY FULLER et al.,

Plaintiffs and Appellants,

v.

KELLY SERVICES, INC., et al.,

Defendants and Respondents.

B215220

(Los Angeles County Super. Ct.
No. BC296800)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mary Thornton House, Judge. Reversed.

Emilio Law Group, Daniel G. Emilio; Gould & Associates and Michael A. Gould for Plaintiffs and Appellants.

Sheppard, Mullin, Richter & Hampton, Richard J. Simmons, Derek R. Havel, Geoffrey D. DeBoskey and Karin Dougan Vogel for Defendants and Respondents.

Plaintiffs and appellants Tracey Fuller and Tamie Hackler appeal from a portion of an order that decertified two classes in an action against defendants and respondents Kelly Services, Inc. and Kelly Home Care Services, Inc. (collectively Kelly Services). One class sought unpaid overtime compensation for caregivers employed by Kelly Services, while the other class sought damages and penalties for failing to comply with the wage statement requirements of Labor Code section 226, subdivision (a).¹ Kelly Services claims the caregivers were “personal attendants” who were exempt from overtime compensation requirements. On appeal, Fuller and Hackler contend: (1) litigating the personal attendant exemption defense does not require an examination of each client’s condition and abilities to determine whether the tasks performed by individual caregivers were exempt; (2) class members suffered the requisite injuries from Kelly Services’ violation of section 226, subdivision (a), to recover penalties under section 226, subdivision (e); and (3) penalties for violation of section 226, subdivision (a) available under section 226.3 do not require any showing of injury. We conclude that the trial court erroneously assumed the condition of individual clients would have to be determined to adjudicate the exemption defense and penalties under section 226.3 for failing to comply with the wage statement requirements of section 226, subdivision (a), do not require any showing that the employees suffered injury. Therefore, we reverse the portion of the order decertifying the classes.

FACTS AND PROCEDURAL BACKGROUND

Action against Kelly Services

Fuller and Hackler filed the instant action against Kelly Services in June 2003. The Private Attorney General Act of 2004 (PAGA) (§ 2698 et seq.) was subsequently enacted permitting aggrieved employees to institute civil actions for the recovery of

¹ All further statutory references are to the Labor Code, unless otherwise stated.

penalties that the Labor and Workforce Developments Agency (LWDA) has authority to assess and collect. The PAGA allows plaintiffs to amend existing complaints to add a cause of action under the PAGA within certain time limits. (§ 2699.3.)

On August 31, 2004, Fuller and Hackler sent a letter to the Department of Labor Standards Enforcement (DLSE) stating, “Enclosed please find the first amended complaint in the above-entitled action you’re your files. Please send the Right to Sue letter to the above address. If you have any question, please call.” The first amended complaint alleged causes of action on behalf of caregivers employed by Kelly Services as follows, including violations of the overtime compensation wage orders of the Industrial Welfare Commission (IWC), Business and Professions Code section 17200, and section 226. Kelly Services is a staffing agency that provides in-home care for the elderly, disabled, and people recovering from illness or injury. Fuller and Hackler worked as caregivers for Kelly Services for more than three years. They regularly worked 12- and 24-hour shifts, but were not paid overtime. Kelly Services claimed employees were “personal attendants” exempt from overtime compensation under IWC wage order No. 15-2001. The preliminary allegations of the complaint stated that six common questions predominated, including whether Kelly Services violated section 226 by failing to provide accurate and itemized statements with employees’ names, addresses, and inclusive statement period dates. The cause of action for violation of section 226 incorporated prior allegations by reference and stated the statutory requirements that itemized wage statements include the employee’s name and social security number, gross wages, total hours worked, net wages earned, the inclusive dates of the period for which the employee is paid, and the applicable hourly rates. The complaint stated Kelly Services intentionally violated sections 226 and 226.3 by furnishing employees with statements that were incorrect and false, and not actually showing the proper amount of overtime and double time pay for the hours worked, with the intention of denying their rights to minimum wage and overtime compensation.

On September 30, 2004, Fuller and Hackler received a right to sue letter stating that the LWDA had received their notice of Labor Code violations pursuant to

section 2699 and after review, did not intend to investigate the allegations. Fuller and Hackler filed the first amended complaint with the court that day.

The operative third amended complaint was filed on June 12, 2006. In addition to the facts above, the third amended complaint stated plaintiffs had complied with the notice and pre-filing requirements of the PAGA and received a notice of intention to not investigate claims from the LWDA within the time limits provided under section 2699 et seq. The cause of action for violation of section 226 sought damages and penalties provided for under sections 226, 226.3, and 2699.

The trial court granted Kelly Services' motion to strike the request for penalties pursuant to section 2699. Penalties are available under section 2699, subdivision (f), for Labor Code violations other than those for which a civil penalty is specifically provided. However, in this case, sections 226, subdivision (e), and 226.3 specifically authorize penalties for violations of section 226, subdivision (a).

Class Certification

On April 30, 2007, Judge Victor Person granted plaintiffs' motion for class certification. As to the cause of action for unpaid overtime compensation, the trial court certified a class of all current and former caregiver employees of Kelly Services in the State of California during the class period of June 5, 1999, through the present who worked more than 8 hours per day and/or more than 40 hours per week and were not paid overtime. As to the wage statement violations of section 226, the court certified a class of all current and former employees employed by Kelly Services in the State of California, who received itemized statements of income during the class period of June 5, 2002, through April 25, 2004, that failed to include the employee's name and/or did not include both starting and ending dates for each pay period.

The trial court noted that Kelly Services had asserted the personal attendant exemption to the overtime class claims. The court noted that under the DLSE's interpretation of the personal attendant exemption, almost any task could come within the

personal attendant exemption as long as it was related to the independent living of the client and could not be performed by the client alone due to a health or age limitation. For the exemption to apply, a personal attendant cannot spend more than 20 percent of his or her time doing work other than the tasks of a personal attendant. The court recognized that whether a task performed for a client fell within the personal attendant exemption depended on the specific needs of each client (to determine when the activities were related to the independent living of the person and cannot be performed by the client alone due to a health or age limitation). However, the court concluded that common questions of law as to which duties performed by caregivers are outside the scope of the personal attendant exemption predominated over individual questions. The court suggested that questions of law could be resolved on a common basis by determining which types of tasks were always covered by the personal attendant exemption, which tasks were never covered by the exemption, and which tasks might be exempt. The court suggested that whether a client's health or age limitation prevented the client from performing the task could be resolved by referring to the client's condition and age and an objective determination of whether that condition and age would reasonably prevent the client from performing the tasks at issue. In this way, individual issues could be effectively managed so as not to render class certification inappropriate.

The trial court noted that despite individual questions of whether each class member exceeded the 20 percent threshold for the exemption, certification allowed the court to determine on a class wide basis which tasks count toward the threshold and the litigation could focus on each class member's estimate of how much time they spent on the various tasks. The class member could be asked by survey and respond under oath estimating a percentage of time spent doing the tasks without knowing the threshold number. Kelly Services would have an opportunity to rebut the percentage. Therefore the court concluded that the complexity of the individual questions did not render class treatment unmanageable. "Instead, the common questions of law to be resolved will render the individual factual questions regarding the 20 [percent] threshold more

manageable.” The court retained jurisdiction to decertify the class if unanticipated or unmanageable individual issues arose.

The trial court noted that the caregivers could seek penalties under section 226.3 as a remedy for violation of section 226, subdivision (a).

Motion for Decertification of Class

Judge Person retired and the matter was assigned to Judge Mary Thornton House. Additional discovery and further proceedings were conducted. In December 2008, Kelly Services filed a motion to decertify the classes. As to the overtime class, Kelly Services argued that individual issues predominated over common questions, and therefore, the class action procedure was not a superior method of resolving claims. Kelly Services argued that the wage statement class must be decertified because showing an injury was an element required to establish liability for penalties under section 226, subdivision (e), not simply an issue that could be addressed in connection with damages. Kelly Services argued that as a result, individualized inquiries predominated over common questions as to the wage statement class as well. Kelly Services did not address the penalties available under section 226.3 for violation of section 226, subdivision (a).

To show that each client required different services, depending on the client’s physical condition, Kelly Services submitted the deposition testimony of 20 class members. Class member Verdester Massey could not state a fixed percentage of time that she spent performing a task during a shift, because it depended on the client. Some clients were completely bedridden, which required that she clean, dress and feed them. Each client was different and each shift was different. Class member Audrey Ramsey testified that the only thing her clients had in common was that they were elderly. Otherwise, none of her clients were the same and each client wanted assistance with different tasks. Class member Bertha Masters testified that no two days of work were alike, because her clients had different problems. Class member Elizabeth Padilla testified that some clients were more independent than others, because their physical

ailments were different, so she provided a different level of care and performed different activities for each client. Class member Christine Taileifi testified that each day with a client was different, due to the arrival of visitors and the clients' different conditions. Class member Sharon Briggs testified that her client's health deteriorated while she was working for him. The duties that she typically performed when she started working for the client changed over time, as did the amount of time spent performing the duties. Class member Renee Michele Paculba fed her client breakfast. She testified that it took 15 minutes to feed her client on a good day and 30 minutes on a bad day. Similar testimony was provided from the other class members.

The motion to decertify the wage statement class was based on deposition testimony of eight class members showing they did not suffer any injury as a result of information missing from their wage statements. Class member Patsy Ann Proctor stated that she has never been injured in any way because of her pay stub. Class member Joyce Watson stated that no one had ever refused to accept her pay stub for lack of information on it. Class member Kataii Sela Tapa was not harmed by any information missing from her pay stub and was never told she could not use her pay stubs as proof of income because information was missing. Class member Janet Sanders never noticed that her name was not on her pay stub and never had any problems with her pay stub. Class member Virginia Ramirez did not think her pay stubs lacked any information. Class member Mary Stevenson was not harmed or deprived of anything as a result of her pay stubs. Class member Evangeline Freeman never noticed that her name was not on her pay stub. Class member Sylvia Archibeque never noticed information missing from her pay stub and never had a problem, such as with a rental or credit card, because information was missing from her pay stub.

In addition, Kelly Services submitted a ruling issued by a Labor Commissioner in October 2002 on a class member's claim for overtime compensation which found that the class member had been properly classified as exempt.

Opposition to Decertification Motion

Fuller and Hackler opposed the motion to decertify the classes. They argued that Kelly Services did not limit the caregiver's duties to the activities of a personal attendant and could not demonstrate that caregivers spent 80 percent of their time performing exempt duties, because although caregivers listed the tasks that they performed on their time sheets, they were not required to account for the amount of time spent on each task. Fuller and Hackler argued that Kelly Services was required to limit the tasks that caregivers performed to supervising, feeding or dressing clients. Relying on a DLSE opinion letter issued in 1994, they argued that making beds, washing clothes, preparing meals, and washing dishes were not duties within the personal attendant exemption.

They submitted Kelly Services' marketing materials stating that services were scheduled to the client's individual needs. A list of illustrative services was provided, including assistance with bathing and dressing, skilled nursing services, meal preparation, help with walking and getting into and out of bed, medication reminders, conversation, companionship, housekeeping and transportation.

They also submitted the declarations and deposition testimony of class members stating that they were supposed to perform the duties needed or requested by their clients and were not limited to supervising, feeding and/or dressing the client. For example, Fuller declared that the duties she performed in addition to client care included washing dishes, mopping floors, taking out the trash, cleaning out the refrigerator, grocery shopping and other errands, washing windows, moving furniture, making an inventory of the contents of the client's house, gardening, watering the lawn, and putting out holiday decorations. Less than 20 percent of her time was spent performing client care, because the client did not do anything. Hackler declared that in addition to client care, she had been required to water the lawn, polish silver, and move furniture.

They submitted an employee handbook stating that all caregiver employees are responsible for light housekeeping, including dusting and vacuuming the client's living areas, doing the client's personal laundry, making the client's bed daily and changing

linens as required, keeping the client's bathroom clean and tidying the kitchen after meal preparation, including mopping the floor as needed. The handbook expressly stated that employees were not expected to scrub floors, wash windows, wash carpets, do household maintenance or yard work, provide assistance or care to anyone other than the client, clean garages, clean cabinets, wash walls, hang drapes, or defrost freezers.

As to the wage statement class, Fuller and Hackler argued that Kelly Services violated section 226, subdivision (a), by failing to state the inclusive dates for each pay period and the employee's name on his or her itemized statement. These violations were effectively conceded. In addition, Kelly Services failed to accurately detail the number of hours worked during a day and failed to maintain pay stub records for three years. They also noted that the injury requirement applied only to one of three penalties being sought for violation of section 226, subdivision (a). They emphasized that Kelly Services' motion addressed solely the penalties under section 226, subdivision (e), and not the other penalties sought by the class for violation of section 226, subdivision (a). In addition, they argued that the injury suffered was not required to be monetary loss. Deprivation of any legal right was an injury, whether the employee recognized it or not.

They also provided declarations of class members who had suffered monetary injury as a result of the violations, from denial of bank or store credit, to the inability to rent an apartment, prove employment to potential employers or apply for government benefits.

Subsequent Proceedings

Kelly Services filed a reply arguing that regardless of whether Kelly Services placed limitations on caregivers' activities, the law focused on the actual duties performed by the employees. Kelly Services also argued that the plaintiffs' narrow interpretation of exempt activities was incorrect and there was no substantial evidence that common issues predominated. They made no argument about the penalties being

sought by the class for violation of section 226, subdivision (a), other than those under section 226, subdivision (e).

A hearing was held on March 5, 2009. There was extensive discussion during the hearing as to the requirements necessary to prove a violation of section 226, subdivision (a), to recover penalties under section 226, subdivision (e), as compared to section 226.3. On March 13, 2009, the trial court issued an order ruling on several summary adjudication motions and the motion to decertify the class issues. Although the caregivers had sought summary adjudication of the defense of failure to exhaust administrative remedies as to the PAGA penalties, the court found issues existed as to whether the notice provided to the LWDA was sufficient under the PAGA. Therefore, the court denied the motion for summary adjudication of the issue. The court questioned whether employees could recover penalties under section 226.3, because it was not one of the sections enumerated in section 2699.5 that is subject to notice requirements. Based on the court's statutory interpretation and the potential failure to exhaust administrative remedies, the court considered that there might be no basis for plaintiffs to recover civil penalties under section 226.3. In that case, the cause of action for violation of section 226, subdivision (a), would be limited to penalties available under section 226, subdivision (e).

The trial court decertified both classes in light of the evidence and the proceedings following certification. As to the overtime class, the court found that the three category classification approach was not workable. There was no dispute that Kelly Services did not pay caregivers overtime and the time sheets provided evidence of each class member's hours over 8 in a day or over 40 in a week. The dispute was whether there was common proof available to determine whether the personal attendant exemption applies to the class members. The court would not simply deny certification because the DLSE believed the personal attendant exemption required a case-by-case analysis, which would effectively insulate employers from class actions whenever the exemption was raised. In certifying the class, Judge Person had found that the tasks performed by class members were susceptible to common proof as to whether they fell into one of three categories.

However, the evidence and arguments had subsequently revealed that whether a task had been performed to assist a client's independent living based on a health or age limitation could not be resolved simply by making an objective determination of whether a particular client's age and condition would reasonably prevent the client from performing the tasks. Each client's needs, competency and abilities would have to be examined. In addition, the court and the parties would need to make a determination as to each class member whether the housekeeping work that was performed for a client was related to the feeding, dressing or supervising of the client and/or necessary for the independent living of the individual because he or she could not perform the task. For example, class members had testified that they vacuumed. The court and the parties would need to determine if vacuuming was performed as a result of a mess made by the client such as spilled food, which might fall into the exempt category of supervision, or if the caregiver vacuumed the entire house as part of a weekly cleaning regiment, which might fall into the category of tasks that were never covered by the exemption. Because common questions did not predominate, adjudication on a class-wide basis would not benefit the court or Kelly Services.

As to the wage statement class, there was no dispute that the statements did not include the class member's name and the beginning date of the pay period. The dispute was whether the failure was knowing and intentional and whether class members suffered any injury due to the inaccuracies. The issue was whether suffering injury was an element of liability or damages, and if liability, whether individual inquiries would predominate. In certifying the class, Judge Person believed individual inquiry would be required, but could be managed as it related to damages. Judge House concluded that an injury was required under the statute before the employer could be liable for providing an inaccurate wage statement, and therefore, the element was not related solely to damages. The trial court noted that needing to file a lawsuit to adjudicate a claim was an injury, however there was no evidence to dispute that individual inquiry would be required to determine if class members suffered any injury. The evidence showed that some members had no problems or never even realized anything was wrong with their wage

statements. Moreover, among the class members who suffered injuries, the nature of the injuries varied widely. The need to conduct individual inquiries to determine if class members suffered injuries defeated commonality. Therefore, the court entered an order decertifying the classes, among other rulings. Fuller and Hackler filed a timely notice of appeal.

DISCUSSION

Class Action Requirements

Code of Civil Procedure section 382 authorizes class actions when “the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court.” The party requesting certification must establish “the existence of both an ascertainable class and a well-defined community of interest among the class members.” (*Linder v. Thrifty Oil Co.* (2000) 23 Cal.4th 429, 435 (*Linder*).) A community of interest consists of: (1) questions of law or fact common to the class that predominate over the questions of individual class members; (2) class representatives with claims or defenses that are typical of the class; and (3) class representatives who can adequately represent the class. (*Lockheed Martin Corp. v. Superior Court* (2003) 29 Cal.4th 1096, 1104 (*Lockheed*).)

“A trial court ruling on a certification motion determines ‘whether . . . the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.’ [Citations.]” (*Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 326 (*Sav-On*).) Class members “must not be required to individually litigate numerous and substantial questions to determine his [or her] right to recover following the class judgment[.]” (*City of San Jose v. Superior Court* (1974) 12 Cal.3d 447, 460 (*San Jose*).)

“The ‘community interest’ analysis applies equally to an order decertifying a class as well as an order granting certification. (See *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1450-1451 [order decertifying subclass].) A class action “will not be permitted . . . where there are diverse factual issues to be resolved, even though there may be many common questions of law.” [Citation.]’ (*Block v. Major League Baseball* (1998) 65 Cal.App.4th 538, 542.)” (*Keller v. Tuesday Morning, Inc.* (2009) 179 Cal.App.4th 1389, 1397.)

Certification is a procedural issue that does not require a determination of the merits of the action. (*Linder, supra*, 23 Cal.4th at pp. 439-440.) “In order to successfully utilize the class action as a tool, ‘trial courts must be accorded the flexibility “to adopt innovative procedures, which will be fair to the litigants and expedient in serving the judicial process.” [Citations.]’ [Citation.] However, the court retains the option of decertifying the class if unanticipated or unmanageable individual issues arise. (*Sav-On, supra*, 34 Cal.4th at p. 335.)” (*Keller v. Tuesday Morning, Inc., supra*, 179 Cal.App.4th at p. 1397.) “When the proposed class action will not provide substantial benefits both to the courts and the litigants, it is proper to deny certification. [Citation.]” (*Evans v. Lasco Bathware, Inc.* (2009) 178 Cal.App.4th 1417, 1421-1422 (*Evans*).)

Standard of Review

“We review the trial court’s ruling for abuse of discretion.” (*Sav-On, supra*, 34 Cal.4th at p. 326.) “Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification.” (*Linder, supra*, 23 Cal.4th at p. 435.) “Our task is to determine whether the record contains substantial evidence to support the trial court’s predominance finding. [Citation.] A valid pertinent reason will be sufficient to uphold the order. [Citation.] We will not reverse the trial court’s ruling, if supported by substantial evidence, unless improper criteria were used or erroneous legal assumptions were made. [Citation.]” (*Keller v. Tuesday Morning, Inc., supra*, 179 Cal.App.4th at p. 1397.)

“Our review is limited to the grounds stated, and we ignore any other grounds that might have supported the ruling. [Citation.] [¶] However, ‘an order based upon improper criteria or incorrect assumptions calls for reversal “even though there may be substantial evidence to support the court’s order.”’ [Citation.] Accordingly, we examine the stated reasons for the order to determine whether the court relied on improper criteria to deny certification. [Citation.]” (*Evans, supra*, 178 Cal.App.4th at pp. 1422-1423.)

Overtime Compensation Class

Fuller and Hackler contend on appeal that adjudication of the personal exemption defense does not require an individual inquiry into the conditions and abilities of each client. We agree.

A. Applicable Overtime Wage Laws

“The Legislature has commanded that ‘[a]ny work in excess of eight hours in one workday and any work in excess of 40 hours in any one workweek . . . shall be compensated at the rate of no less than one and one-half times the regular rate of pay for an employee.’ [(§ 510, subd. (a).)] The [IWC], however, is statutorily authorized to ‘establish exemptions from the requirement that an overtime rate of compensation be paid . . . for executive, administrative, and professional employees, provided [inter alia] that the employee is primarily engaged in duties that meet the test of the exemption, [and] customarily and regularly exercises discretion and independent judgment in performing those duties’ (*Id.*, § 515, subd. (a).)” (*Sav-On, supra*, 34 Cal.4th at p. 324.)

During the period covered by the complaint, IWC wage order No. 15-2001, codified at California Code of Regulations, title 8, section 11150, provided an exemption from the overtime compensation requirements for “personal attendants.” “‘Personal attendant’ includes baby sitters and means any person employed by a private householder

or by any third party employer recognized in the health care industry to work in a private household, to supervise, feed, or dress a child or person who by reason of advanced age, physical disability, or mental deficiency needs supervision. The status of ‘personal attendant’ shall apply when no significant amount of work other than the foregoing is required.” (Cal. Code Regs., tit. 8, § 11150, subd. 2(J).) The underlying merits of the overtime class litigation concern whether or not the caregivers were properly classified as personal attendants and paid under this exemption.

In *Cardenas v. Mission Industries* (1991) 226 Cal.App.3d 952, 959, the court found substantial evidence supported finding a household employee who cared for her employer’s children was not 3a personal attendant because her activities included a significant amount of work unrelated to the care of the children. The *Cardenas* court cited to a draft of the operations and procedures manual relied on by the Office of the Labor Commissioner to further interpret the meaning of “personal attendant” under the predecessor wage order No. 15-86. Section 231 of the manual provided that “duties of a personal attendant may normally include household work related to the care of a child or infirm person, such as cooking, making the bed or washing the clothes for that individual. The manual also directs that ‘[o]ther general housework may also be included if it does not constitute a “significant” amount, that is, if it does not exceed 20 percent of the hours worked in the week.’” (*Cardenas v. Mission Industries, supra*, at p. 958, disapproved on another ground in *Smith v. Rae-Venter Law Group* (2002) 29 Cal.4th 345, 370.)

“Interpretive bulletin 86-1, issued by the Labor Commissioner on March 12, 1986, defines ‘no significant amount of work other than the foregoing’ in the wage order’s definition of ‘personal attendant’ to mean ‘not more than 20 percent of the work time,’ and adds that ‘[u]sually, such “other” work involves housekeeping duties.’” (*Cardenas v. Mission Industries, supra*, 226 Cal.App.3d at p. 958.)

In November 2005, the Division of Labor Standards Enforcement (DLSE) issued an opinion letter in response to a request for clarification of the scope of duties within the definition of the personal attendant exception. The November 2005 letter referred to prior DLSE opinion letters that had stated “bathing and dressing the client or taking the

person on an outing would obviously be described as personal attendant work” and “‘supervision’ would necessary include certain efforts that are essential for independent living other than feeding and dressing (including isolated instances where assistance with medications is provided).”

The November 2005 letter stated, “A determination that an individual is a personal attendant has the effect of exempting that person from the protections of the IWC Order, except for minimum wage. Accordingly, we must continue to stress, as has been emphasized in every prior DLSE communication on this topic, that such a determination is fact intensive and must be narrowly construed on a case-by-case basis.” (Fn. omitted.)

In addition, the letter stated, “We cannot provide you with a comprehensive list of acceptable duties for a personal attendant. However it is instructional, and not inconsistent with the long standing DLSE position, to consider those duties included by the U.S. Department of Health and Human Services National Center for Health Statistics’ definitions for activities of daily living. Such activities relate to personal care and include, but are not limited to, such duties as bathing, showering, getting in or out of a bed or chair and using a toilet. ‘Supervising’ may also include assistance in obtaining medical care, preparing meals, managing money, shopping for groceries or personal items, using a telephone or performing housework when such activities are related to the independent living of the person and cannot be performed by him or herself alone due to a health or age limitation.”

B. Examination of Clients’ Conditions and Abilities

Fuller and Hackler contend the trial court’s conclusion that individual questions predominate as to the overtime claim was based on an erroneous assumption that each client’s condition and abilities would have to be examined in order to adjudicate the personal attendant exemption defense. We agree.

“As the focus in a certification dispute is on what type of questions—common or individual—are likely to arise in the action, rather than on the merits of the case

[citations], in determining whether there is substantial evidence to support a trial court's certification order, we consider whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment. [Citations.] 'Reviewing courts consistently look to the allegations of the complaint and the declarations of attorneys representing the plaintiff class to resolve this question.' [Citations.]" (*Sav-On, supra*, 34 Cal.4th at p. 327.)

The complaint, the motion to certify the class, the opposition to the motion to decertify the class and plaintiffs' briefs on appeal consistently allege and argue that the personal attendant exemption does not apply to the caregivers' overtime class because more than 20 percent of the tasks that the caregivers performed were not exempt. Plaintiffs have never alleged or argued that the exemption does not apply because the caregivers performed tasks for clients who did not require assistance with feeding, dressing or supervision. Rather, plaintiffs' position is that more than 20 percent of the tasks performed by the caregivers were not exempt activities even when performed for a client who requires assistance with feeding, dressing, or supervision. Therefore, the trial court's order decertifying the overtime compensation class must be reversed, because it was based on incorrect legal assumptions.

In moving to decertify the overtime class, Kelly Services relied on deposition evidence showing that the personal attendant exemption may be even less applicable to some caregivers than plaintiffs allege, and as a result will require adjudication of a multitude of individual issues. However, the burden at trial will be on Kelly Services to show that 80 percent of the tasks performed by the caregivers performed were exempt. In its order decertifying the overtime class, the trial court erroneously assumed issues would need to be resolved as to each class member concerning whether the work performed was necessary for the client's independent living, but plaintiffs have never placed the conditions and abilities of the clients at issue by claiming the clients were not in need of feeding, dressing or supervision.

Wage Statement Class

Fuller and Hackler contend the trial court erroneously concluded individual issues would predominate over common issues in resolution of the claim for violation of the wage statement requirements. We agree.

A. Applicable Wage Statement Laws

Every employer is required to provide employees with accurate itemized written statements containing the specific information set forth in section 226, subdivision (a), including “the inclusive dates of the period for which the employee is paid,” “the name of the employee” and “all applicable hourly rates in effect during the pay period and the corresponding number of hours worked at each hourly rate by the employee.”

If an employer violates the wage statement requirements of section 266, subdivision (a), the Labor Code provides a variety of remedies. One remedy for injured employees is set forth in section 226, subdivision (e): “An employee suffering injury as a result of a knowing and intentional failure by an employer to comply with subdivision (a) is entitled to recover the greater of all actual damages or fifty dollars (\$50) for the initial pay period in which a violation occurs and one hundred dollars (\$100) per employee for each violation in a subsequent pay period, not exceeding an aggregate penalty of four thousand dollars (\$4,000), and is entitled to an award of costs and reasonable attorney’s fees.”

The Labor Commissioner can assess penalties against employers who violate section 226, subdivision (a), under section 226.3: “Any employer who violates subdivision (a) of Section 226 shall be subject to a civil penalty in the amount of two hundred fifty dollars (\$250) per employee per violation in an initial citation and one thousand dollars (\$1,000) per employee for each violation in a subsequent citation, for which the employer fails to provide the employee a wage deduction statement or fails to keep the records required in subdivision (a) of Section 226. The civil penalties provided

for in this section are in addition to any other penalty provided by law. In enforcing this section, the Labor Commissioner shall take into consideration whether the violation was inadvertent, and in his or her discretion, may decide not to penalize an employer for a first violation when that violation was due to a clerical error or inadvertent mistake.”

The PAGA, through section 2699, subdivision (a), allows aggrieved employees to pursue civil actions to recover any penalties that the LWDA is authorized to assess and collect: “Notwithstanding any other provision of law, any provision of this code that provides for a civil penalty to be assessed and collected by the [LWDA] . . . for a violation of this code, may, as an alternative, be recovered through a civil action brought by an aggrieved employee on behalf of himself or herself and other current or former employees pursuant to the procedures specified in Section 2699.3.” An aggrieved employee is defined as any employee “against whom one or more of the alleged violations was committed.” (§ 2699, subd. (c).)

Section 2699, subdivision (e) of the PAGA clarifies that where the LWDA would have had discretion to assess a civil penalty, a court has authority to exercise the same discretion, and moreover, the court may award a lesser amount than the maximum civil penalty if, based on the facts and circumstances of the particular case, to do so would result in an award that is unjust, arbitrary and oppressive or confiscatory.

Section 2699, subdivision (f), sets forth penalties for violation of Labor Code provisions for which no civil penalty has been specifically stated. Civil penalties recovered by employees are distributed 75 percent to the LWDA for use in enforcement and education about labor laws and 25 percent to the employees. (§ 2699, subd. (i).)

An employee must meet requirements set forth in section 2699.3 prior to filing a civil action under subdivision (a) or (f) of section 2699 alleging a violation of any provision listed in section 2699.5, which specifically includes actions alleging a violation of subdivision (a) of section 226. The employee must give written notice by certified mail to the LWDA and the employer “of the specific provisions of this code alleged to have been violated, including the facts and theories to support the alleged violation.” (§ 2699.3, subd. (a)(1).) The LWDA must notify the employer and the employee by

certified mail that it does not intend to investigate the alleged violation within 30 days, and upon receipt of the LWDA's notice, the employee may commence a civil action under section 2699. (§ 2699.3, subd. (a)(2)(A).) However, if the agency intends to investigate the alleged violation, it must notify the employer and the employee with the specified time limit and may investigate and issue any appropriate citation within 120 days. (§ 2699.3, subd. (a)(2)(B).) If the agency does not issue a citation within the specified time limit, the employee may commence a civil action under section 2699. (§ 2699.3, subd. (a)(2)(B).)

B. Common Issues

Fuller and Hackler contend the trial court's finding that individual issues predominated over common issues was erroneous as to the wage statement class, because the trial court incorrectly assumed class members would have to prove they suffered injury to be entitled to recovery for violation of section 226, subdivision (a). We agree.

The complaint seeks penalties for violation of section 226, subdivision (a), under section 226, subdivision (e), and section 226.3. Section 226.3 penalties do not require employees to prove they suffered injuries as a result of the violation. Plaintiffs' opposition to the motion to decertify the class noted that Kelly Services' motion failed to address the penalties authorized under section 226.3.

In connection with one of the motions for summary adjudication, the trial court ruled that triable issues existed as to whether Fuller and Hackler had properly given notice to the LWDA of their allegations and exhausted their administrative remedies. This ruling did not foreclose the possibility of recovering penalties under section 226.3 for the violations of section 226, subdivision (a).

Therefore, it seems clear that common questions predominate over individual issues as to whether the wage statements supplied by Kelly Services violated section 226, subdivision (a), for the purposes of assessing penalties under section 226.3. We note Judge Person's certification order acknowledged that individual issues would need to be

resolved in order for employees to establish a right to recover damages or penalties under section 226, subdivision (e). There has been no showing that these individual issues are any different or more cumbersome when the injury is considered as an element of liability as proposed by Kelly Services.

Kelly Services contends that the wage statement class certification did not include the claim for penalties under section 226.3. However, the penalties were not elements of the class certification. The portion of the order decertifying the wage statement class must be reversed.

DISPOSITION

The portion of the March 13, 2009 order decertifying the classes is reversed. Appellants Tracey Fuller and Tamie Hackler are awarded their costs on appeal.

KRIEGLER, J.

We concur:

ARMSTRONG, Acting P. J.

MOSK, J.